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4 TORIANO GERMAINE HUDSON,  
5 Plaintiff,  
6 v.  
7 DIAZ, et al.,  
8 Defendants.

9 Case No. 15-cv-00787-SI  
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**ORDER GRANTING SUMMARY  
JUDGMENT FOR DEFENDANTS  
MARWEG, OJO AND SOUSA;  
REFERRING ACTION TO PRO SE  
PRISONER MEDIATION PROGRAM**

12 Re: Dkt. No. 65  
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In this *pro se* civil rights action under 42 U.S.C. § 1983, Toriano Germaine Hudson sues seven Richmond police officers for use of excessive force during his arrest on January 17, 2015. Three of the seven officers now move for summary judgment, urging that there is no evidence that those three officers are liable for the allegedly excessive force because they did not use any force on Hudson and had no realistic opportunity to intervene to prevent the use of allegedly excessive force. Hudson opposes the motion. For the reasons discussed below, summary judgment will be granted in favor of defendants Marweg, Ojo, and Sousa.

**BACKGROUND**

On January 17, 2014, Hudson caused a car accident while driving his SUV. *See* Dkt. No. 1 at 3. He was handcuffed and placed in the back of a patrol car by officers from the Richmond Police Department. *Id.* According to Hudson, he was then taken out of the patrol car and subjected to excessive force by officers from the Richmond Police Department. *Id.*

The following facts are undisputed:

On January 17, 2014, officers Ojo, Marweg, and Sousa were travelling separately and

1 responded to a call regarding a vehicle collision near 782 7th Street in Richmond, CA. Dkt. No.  
2 65 at 4. Each officer arrived separately, and each was unaware of the circumstances of Hudson's  
3 arrest. *Id.* Officer Marweg was the first to arrive on the scene, followed by officer Ojo and then  
4 officer Sousa.

5 Officer Marweg arrived on the scene to collect photographic evidence. Dkt. No. 65 at 5.  
6 When officer Marweg began photographing the scene, Hudson was detained in a patrol car half a  
7 block away. *Id.* From his vantage point, officer Marweg noticed Hudson kicking the inside of the  
8 patrol car door. *Id.* Officer Marweg then turned his attention to the immediate need for crowd  
9 control, and his back was toward Hudson and the other officers dealing with Hudson. *Id.* At some  
10 point, Hudson escaped or was removed from the patrol car, and other officers restrained him.  
11 Meanwhile, officer Marweg continued to do crowd control while facing away from Hudson and  
12 the other police officers. Dkt. No. 65 at 5. After other officers took over the crowd control duties,  
13 officer Marweg resumed taking photographs of the scene, at which time Hudson had been placed  
14 in a Wrap restraint and seated on the ground in the street. Dkt. No. 65 at 5-6. Officer Marweg  
15 took a few photographs of Hudson and then left the scene. *Id.* at 6. Officer Marweg did not have  
16 any physical contact with Hudson, nor did he witness any of the other officers have any physical  
17 contact with Hudson. *Id.*

18 When officer Ojo arrived at the scene, he saw a group of officers approximately thirty to  
19 forty feet away in the street. *Id.* at 5. They appeared to officer Ojo to be detaining a suspect, but  
20 officer Ojo could not see who they were grouped around or what they were doing. *Id.* Officer Ojo  
21 immediately began helping with crowd control efforts after noticing people coming into the  
22 surrounding area and crowding the street. *Id.* Officer Ojo stood at the western curb near the scene  
23 with his back facing the group of officers, and began directing people away from the center of the  
24 road where he had seen the group of officers. *Id.* At some point, he conducted two witness  
25 interviews. Dkt. No. 65-3 ¶ 6. Officer Ojo never saw or came into contact with Hudson, nor did  
26 he ever witness the other officers come into physical contact with Hudson. *Id.*

27 When officer Sousa arrived at the scene, Hudson was in a Wrap restraint, seated on the  
28 ground in the street. *Id.* at 6. Officer Sousa's role was to assist other officers by following the

1 ambulance transporting Hudson to the hospital. *Id.* Officer Sousa did not have any physical  
2 contact with Hudson, nor did he witness any of the other officers have any physical contact with  
3 Hudson. *Id.*

4 At his deposition, Hudson was asked about the individual defendants' role in the use of  
5 force on him. Hudson admitted that he chose the seven officers to name as defendants because  
6 “[t]hose are the ones [he] got off the police report.” Dkt. No. 65-1 at 6. Hudson gave the  
7 following testimony in response to questions about the role of each of the three moving  
8 defendants:

9 Q: Officer Ojo, what do you believe he did that he shouldn't have  
10 done?

11 A: I don't know. He was there. I don't know what part he played in it.

12 \* \* \*

13 Q: . . . [W]hat do you believe Officer Marwig did that he should not  
14 have done?

15 A: I don't know what Officer Marwig did either.

16 Q: Officer Rick Souza, what do you believe Officer Souza did that he  
17 should not have done?

18 A: I don't know what part Officer Souza played neither.

19 Dkt. No. 65-1 at 7-8 .

## 20 VENUE AND JURISDICTION

21 Venue is proper in the Northern District of California because the events or omissions  
22 giving rise to this action occurred in Contra Costa County, located in the Northern District. *See* 28  
23 U.S.C. §§ 84, 1391(b). This court has federal question jurisdiction over this action under 42  
24 U.S.C. § 1983. *See* 28 U.S.C. § 1331.

## 25 LEGAL STANDARD

26 Summary judgment is proper where the pleadings, discovery, and affidavits show that  
27 there is “no genuine dispute as to any material fact and [that] the moving party is entitled to

1 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A court will grant summary judgment  
2 “against a party who fails to make a showing sufficient to establish the existence of an element  
3 essential to that party’s case, and on which that party will bear the burden of proof at trial . . . since  
4 a complete failure of proof concerning an essential element of the nonmoving party’s case  
5 necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23  
6 (1986). A fact is material if it might affect the outcome of the suit under governing law, and a  
7 dispute about a material fact is genuine “if the evidence is such that a reasonable jury could return  
8 a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

9 Generally, the moving party bears the initial burden of identifying those portions of the  
10 record which demonstrate the absence of a genuine issue of material fact. The burden then shifts  
11 to the nonmoving party to “go beyond the pleadings and by [his or her] own affidavits, or by the  
12 ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing  
13 that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324 (citations omitted).

14 A verified complaint may be used as an opposing affidavit under Rule 56, as long as it is  
15 based on personal knowledge and sets forth specific facts admissible in evidence. *See Schroeder*  
16 *v. McDonald*, 55 F.3d 454, 460 & fn.10-11 (9th Cir. 1995) (treating plaintiff’s verified complaint  
17 as an opposing affidavit where, even though verification was not in conformity with 28 U.S.C.  
18 § 1746, plaintiff stated under penalty of perjury that contents were true and correct, and allegations  
19 were not based purely on his belief but on his personal knowledge). Here, Hudson’s second  
20 amended complaint (Dkt. No. 47) was not signed under penalty of perjury and, therefore, is not  
21 considered evidence for purposes of deciding the motion.

22 The court’s function on a summary judgment motion is neither to make credibility  
23 determinations nor to weigh conflicting evidence with respect to a disputed material fact. *See*  
24 *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). The evidence  
25 and the inferences to be drawn from the facts must be viewed in the light most favorable to the  
26 nonmoving party. *Id.* at 631. “If direct evidence produced by the moving party conflicts with  
27 direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence  
28 set forth by the nonmoving party with respect to that fact.” *Id.*

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2 **DISCUSSION**3 A. Motion For Summary Judgment

4 Defendants may prevail on a motion for summary judgement if there is “no genuine  
5 dispute as to any material fact.” Fed. R. Civ. P. 56(a). Defendants Ojo, Marweg, and Sousa claim  
6 they are entitled to summary judgment because Hudson has provided no evidence to controvert  
7 their evidence that they played no role in the force used during his arrest. Dkt. No. 65 at 7.  
8 Defendants argue that they did not use force on Hudson and had “no realistic opportunity to  
9 intercede and prevent the allegedly wrongful use of force” by any other officers. *Id.* at 8 (internal  
10 quotations omitted).

11 “Under the Fourth Amendment, police may use only such force as is objectively  
12 reasonable under the circumstances.” *Cunningham v. Gates*, 229 F.3d 1271, 1288 (9th Cir. 2000).  
13 Police officers not directly involved in the use of excessive force may nonetheless “have a duty to  
14 intercede when their fellow officers violate the constitutional rights of a suspect or other citizen.”  
15 *Id.* at 1289 (quoting *United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir.1994), *rev'd on other*  
16 *grounds*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)). However, officers can be held  
17 liable for failing to intercede only if they had a realistic opportunity to intercede. *Id.* The law  
18 does not impose liability on an officer who may have been present at the time of the arrest but had  
19 no “realistic opportunity” to intercede. *See Cunningham*, 229 F.3d at 1290 (concluding that non-  
20 shooting officers present at the time of the shooting were not liable because they had no “realistic  
21 opportunity” to intercede).

22 Viewing the evidence and reasonable inferences therefrom in the light most favorable to  
23 Hudson, no reasonable jury could find in his favor and against the moving defendants. The  
24 undisputed evidence shows that none of the three defendants used any force whatsoever on  
25 Hudson. The undisputed evidence also shows that the three defendants played no role in the use  
26 of allegedly excessive force AND had no realistic opportunity to intervene to prevent that use of  
27 force from occurring.

28 There is no evidence that officer Marweg witnessed any use of force on Hudson. Although

1 officer Marweg eventually saw Hudson when he took Hudson's photograph, Hudson was already  
2 detained in a Wrap restraint at that point in time. Dkt. No. 65-2 ¶¶ 5, 6. It is undisputed that  
3 officer Marweg at no point observed "any other officers having physical contact with Plaintiff at  
4 the scene of his arrest." *Id.* ¶ 8, 9. Hudson presents no evidence to the contrary and actually  
5 admitted during his deposition that he did not know what officer Marweg did wrong. Dkt. No. 65-  
6 1 at 8. Hudson fails to present any evidence that would allow a reasonable jury to find officer  
7 Marweg liable on a failure-to-intervene theory.

8 Similarly, there is no evidence that officer Ojo saw any use of force on Hudson. It is  
9 undisputed that officer Ojo only saw officers grouped around a suspect about thirty to forty feet  
10 away from Ojo. *See* Dkt. No. 65-3 ¶ 3. It also is undisputed that at no point did officer Ojo  
11 "observe other officers have physical contact with Plaintiff." *Id.* ¶ 8. Hudson presents no  
12 evidence to contradict officer Ojo's declaration and, as with officer Marweg, Hudson actually  
13 admitted during his deposition that he did not know what officer Ojo did wrong. On this evidence,  
14 no reasonable jury could find officer Ojo liable on a failure-to-intervene theory.

15 A police officer "not present at the time" of the violent act has no opportunity to intercede  
16 and therefore no liability on a failure-to-intervene theory. *See Cunningham*, 229 F.3d at 1290 ("In  
17 this case, officers who were not present at the time of the shootings could not intercede to prevent  
18 their fellow officers from shooting at Cunningham . . . ."). Here, it is undisputed that officer  
19 Sousa did not appear at the scene until after the alleged use of force already occurred and Hudson  
20 had been placed in a Wrap restraint. *See* Dkt. No. 65-4 ¶¶ 2-5. Just as with respect to officers  
21 Marweg and Ojo, Hudson does not offer evidence to rebut Sousa's evidence that he did not arrive  
22 until after the allegedly excessive force was used. As with the other officers, Hudson actually  
23 admitted during his deposition that he did not know what officer Sousa did wrong. On this  
24 evidence, no reasonable jury could find officer Sousa liable on a failure-to-intervene theory.

25 Hudson makes the conclusory statement that "[a]ll officers who did not assist the assault,  
26 watched." Dkt. No. 62 at 2. He claims there to be a material issue of fact as to whether officers  
27 Ojo, Sousa, and Marweg had the opportunity to prevent the other officers' use of force. *Id.*  
28 However, in his deposition, Hudson conceded that he picked "individuals to name as defendants in

1 this lawsuit” based on the names that appeared in the police report and had no information as to  
2 the involvement of each of the three moving defendants. Dkt. No. 65-1 at 7-8. Hudson does not  
3 show that the police report contains any statement that any of the moving defendants used force or  
4 witnessed the use of force on him. Although his conclusory statement that all “officers who did  
5 not assist the assault, watched” is under oath, it is insufficient to show a genuine issue for trial in  
6 light of Hudson’s concession at his deposition that he does not know what part any of the moving  
7 defendants played in the alleged wrongdoing. Officers Ojo, Sousa, and Marweg could not have  
8 had the opportunity to intervene to prevent a use of force they did not witness, and there is no  
9 evidence that they witnessed any use of force on Hudson. *See Cunningham*, 229 F.3d at 1290  
10 (concluding “that the non-shooting and non-present officers cannot be held liable for failing to  
11 intercede to prevent the shooting of the plaintiffs”); *see also Blackenhorn v. City of Orange*, 485  
12 F.3d 463, 481 n.12 (9th Cir. 2007) (concluding summary judgment was proper for an officer who  
13 arrived on the scene after the arrest was completed and for another officer who “at most provided  
14 crowd control” but did not participate in the arrest). On this record, no reasonable jury could find  
15 in favor of Hudson on his claim that the three moving defendants are liable for the use of  
16 excessive force on him or failed to intervene to prevent the use of excessive force. Defendants  
17 Marweg, Ojo and Sousa are entitled to judgment as a matter of law in their favor.

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19       B.     Miscellaneous Matters

20       After the motion for summary judgment was fully briefed, Hudson sent in a document  
21 labeled “answer to declaration in support of defendants’ motion for summary judgment and  
22 relief.” Dkt.. No. 71. The document makes many conclusory assertions and contends that an  
23 unspecified defendant failed to provide copies of several documents.

24       Under Federal Rule of Civil Procedure 56(d), if a party against whom summary judgment  
25 is sought shows by declaration or affidavit that, “for specified reasons, [he] cannot present facts  
26 essential to justify [his] opposition,” the court can defer or deny the summary judgment motion, or  
27 allow time for the nonmovant to obtain the evidence. The party opposing summary judgment  
28 must make clear “what information is sought and how it would preclude summary judgment.”

1       *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998); *see also Noriega-Perez v. United States*, 179  
2       F.3d 1166, 1170 n.1 (9th Cir. 1999) (ALJ’s denial of discovery motion proper where party failed  
3       to show requested documents were relevant and could have affected the outcome of the summary  
4       judgment motion).

5              Assuming arguendo that the “answer” is intended to be a request under Rule 56(d), Hudson  
6       fails to show that Rule 56(d) requires a continuance or delay in the adjudication of the motion for  
7       summary judgment. First, Hudson does not show that he actually served discovery requests for  
8       the documents he claims were not produced. The court reminded Hudson five months ago of the  
9       need to finish his discovery in time to be ready to oppose the summary judgment motion. *See* Dkt.  
10      No. 61. Second, even if discovery requests were properly made or planned, Hudson has not  
11      shown that the documents sought are essential to his opposition to the pending motion for  
12      summary judgment. Hudson only identifies several documents generally (e.g., statements made  
13      by defendants and police reports made on the date of his arrest, as well as other miscellaneous  
14      items) that he hopes might have something helpful in them. Hudson has had the police report  
15      written by officer Diaz since no later than November 2015. *See* Dkt. No. 54; Dkt. No. 68 at 4-5.  
16      In fact, he may have had the police report before this action was even filed because he testified  
17      that he selected defendants for this action from the police report. Further, Hudson’s claimed need  
18      for a deposition transcript appears to refer to his own deposition. He does not show what  
19      information that transcript would have that he could not obtain merely by consulting his own  
20      memory. Hudson has not shown that any of the identified documents contains facts essential to  
21      his opposition; he has not made clear “what information is sought and how it would preclude  
22      summary judgment against him.” *Margolies*, 140 F.3d at 853. The summary judgment motion  
23      will not be delayed to enable Hudson to hunt for evidence of unknown value.

24              Plaintiff filed yet another amended complaint (Dkt. No. 68.). The pleading is stricken for  
25      the reasons stated in the order at Dkt. No. 64.

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27      C.      Referral to Pro Se Prisoner Mediation Program

28              The court has granted summary judgment in favor of three defendants. The four other

1 defendants chose not to move for summary judgment, so the excessive force claim against those  
2 four defendants remains for adjudication. This case appears a good candidate for the court's  
3 mediation program.

4 Good cause appearing therefor, this case is now referred to Magistrate Judge Vadas for  
5 mediation or settlement proceedings pursuant to the Pro Se Prisoner Mediation Program. The  
6 proceedings will take place within one hundred twenty days of the date this order is filed.  
7 Magistrate Judge Vadas will coordinate a time and date for mediation or/settlement proceedings  
8 with all interested parties and/or their representatives and, within five days after the conclusion of  
9 the proceedings, file with the court a report for the prisoner mediation or settlement proceedings.

10

11 **CONCLUSION**

12 For the foregoing reasons, the motion for summary judgment filed by defendants Marweg,  
13 Ojo, and Sousa is GRANTED. Dkt. No. 65. These three defendants are entitled to judgment as a  
14 matter of law on Hudson's complaint. The court will wait until all claims are resolved as to all  
15 defendants before entering a single judgment.

16 This action is now referred to Magistrate Judge Vadas for mediation or settlement  
17 proceedings pursuant to the Pro Se Prisoner Mediation Program. The clerk will send a copy of  
18 this order to Magistrate Judge Vadas.

19

20 **IT IS SO ORDERED.**

21 Dated: November 21, 2016

22   
23 SUSAN ILLSTON  
United States District Judge